No. 91-652

In the Supreme Court of the United States

OCTOBER TERM, 1991

281-300 JOINT VENTURE, PETITIONER

v.

ROBERT ONION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
THOMAS L. HINDES
P. MATTHEW SUTKO
CHRISTOPHER J. BELLOTTO
Attorneys
Resolution Trust Corporation
Washington, D.C. 20429

QUESTIONS PRESENTED

1. Whether Section 212(j) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 deprived the district court of power to enjoin the Resolution Trust Corporation, acting as conservator for a savings and loan association, from conducting a non-judicial foreclosure.

2. Whether the court of appeals erred in affirming the district court's dismissal of petitioner's remaining claims as moot.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 938 F.2d 35. The opinion of the district court (Pet. App. 14-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1991, and a petition for rehearing was denied on July 15, 1991. The petition for a writ of certiorari was filed on October 15, 1991 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 28, 1987, petitioner 281-300 Joint Venture obtained an $8,100,000 wrap-around loan from San Antonio Savings Association (SASA) for the development of 296 acres of land in Bexar County, Texas. The loan was evidenced by a loan agreement, note, and deed of trust providing that SASA could foreclose on the land if petitioner failed to make payments. The land was encumbered by two superior liens. Under the loan agreement, SASA would advance sums to petitioner to pay the senior obligations and a portion of the interest on the SASA note. A portion of the interest on the SASA note, however, was to be paid from funds other than those advanced by SASA. Beginning in January of 1989, petitioner failed to make interest payments to SASA. Pet. App. 2-3.

On February 28, 1989, the Federal Home Loan Bank Board (FHLBB) declared SASA insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator. The FHLBB subsequently determined that if SASA's assets were converted to cash, with cash distributions made to secured creditors, there would be insufficient assets to pay depositors in full. On July 12, 1989, the FHLBB appointed the FSLIC as receiver. The FHLBB directed the FSLIC to liquidate all claims against SASA in accordance with applicable federal regulations. Those regulations and Texas law provide that if, as here, the failed institution's assets are insufficient to pay depositors in full, lower priority classes of creditors, including general unsecured creditors, are entitled to receive no payment on their claims. See 12 C.F.R. 569c.11(a)(6) (1989); Tex. Rev. Civ. Stat. Ann. art. 852a, § 8.09(g)(2), (3) and (4) (Vernon Supp. 1991). Pet. App. 3-4.

The FSLIC took possession of SASA's assets and, in accordance with the FHLBB's receivership regulations, succeeded to all of SASA's rights, titles, powers, and privileges. To facilitate the liquidation of SASA, the FHLBB authorized the creation of a new association, San Antonio Savings Association, F.A. (New SASA), and immediately appointed the FSLIC to act as its conservator. The FSLIC, as conservator for New SASA and receiver for SASA, entered into an acquisition agreement whereby New SASA acquired substantially all of SASA's assets. New SASA also assumed certain of SASA's liabilities, but not including any of SASA's liabilities on general unsecured claims. Accordingly, New SASA acquired the petitioner's loan agreement, note, and deed of trust, along with the right to collection and foreclosure, but New SASA assumed no liability for petitioner's claims against SASA. On August 9, 1989, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, abolished the FSLIC, and the Resolution Trust Corporation (RTC) succeeded the FSLIC as conservator for New SASA and as receiver for SASA. Pet. App. 4.

2. Petitioner commenced this lawsuit in state court seeking a temporary restraining order and permanent injunction barring the conservator for New SASA and its substitute trustee, Robert F. Onion, from foreclosing on the 296 acres of land that served as security for petitioner's loan. The case was removed to the United States District Court for the Western District of Texas. The RTC posted the property for foreclosure, but no sale took place because petitioner went into bankruptcy. On October 31, 1989, on a motion by the RTC, the bankruptcy court lifted its stay, leaving no impediment to a foreclosure sale.

On November 13, 1989, the RTC again posted the property for foreclosure. Pet. App. 5.

On November 17, 1989, petitioner filed a motion for a preliminary injunction in the district court. The district court denied that motion. It relied on Section 212(j) of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), which provides:

> Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

12 U.S.C. 1821(j) (Supp. I 1989). The district court concluded that "[t]he nonjudicial foreclosure scheduled for December 5, 1989, constitutes an exercise of power of the RTC as a conservator" for New SASA and that federal law "thus prohibits this Court from restraining the scheduled foreclosure." Pet. App. 16-17.

The RTC, as conservator for New SASA, foreclosed on December 5, 1989. On June 27, 1990, the RTC as receiver for SASA filed a motion to dismiss petitioner's remaining claims, which sought damages from SASA and a declaration of the rights of the parties under the loan agreement. Pet. App. 5. The RTC argued that petitioner's claims against SASA were moot in light of the FHLBB's prior determination that if SASA's assets were converted to cash, they would be insufficient to pay depositors in full. Petitioner failed to respond to that submission. Pet. App. 5, 14. On July 31, 1990, the district court ruled that SASA would never have sufficient assets from which to satisfy a judgment and, relying on

Triland Holdings & Co. v. *Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989), accordingly dismissed petitioner's claims against SASA and the trustee. Pet. App. 5, 14-15.

3. The court of appeals affirmed. The court rejected petitioner's contention that Section 212(j) does not give the RTC any broader protection from suit than the failed institution would have. It ruled, in accordance with this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), that Section 212(j) bars injunctive relief unless the power or function sought to be enjoined is beyond the powers granted to the RTC by statute. The court of appeals found that RTC's exercise of nonjudicial foreclosure rights under petitioner's deed of trust clearly fell within the scope of: (1) 12 U.S.C. 1821(d)(2)(B)(ii) (Supp. I 1989), which authorizes the RTC to "collect all obligations and money due the [failed] institution"; (2) 12 U.S.C. 1821(d)(2)(B)(iv) (Supp. I 1989), which authorizes the RTC to "preserve and conserve the assets and property of [the failed] institution"; and (3) 12 U.S.C. 1821(d)(2)(D)(i) (Supp. I 1989), which authorizes the RTC to put the institution "in a sound and solvent condition." Pet. App. 6-9. The court of appeals rejected petitioner's constitutional challenges to the district court's refusal to grant the injunction, finding those claims to be "meritless." Pet. App. 10.

The court of appeals also rejected petitioner's argument that the district court erred in dismissing petitioner's request for other relief. Petitioner had asserted that the receiver for SASA had offered no evidence of the value of SASA's assets and therefore the district court could not rule that petitioner would never be able to collect on a judgment for monetary damages. The court of appeals concluded, however, that the FHLBB's determination that SASA's assets

would be insufficient to pay depositors and secured creditors constituted sufficient evidence of SASA's worthlessness. Pet. App. 6. Relying on its prior decision in *Gulley* v. *Sunbelt Savings, F.S.B.*, 902 F.2d 348, 351 (5th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991), the court of appeals ruled that the district court had properly rejected petitioner's attempt to collaterally attack the FHLBB's determination, because petitioner had never sought judicial review of the FHLBB's worthlessness determination. The court found no reason to grant equitable relief or a declaration regarding the rights of the parties. It held that petitioner had no right to any of SASA's assets because of the FHLBB's worthlessness finding, and it had no right to any of New SASA's assets because New SASA had assumed no liabilities from SASA relating to the loan agreement with petitioner. Pet. App. 6-7.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review, accordingly, is unwarranted.

1. The court of appeals correctly affirmed the district court's determination that it lacked authority to enjoin the RTC, as conservator for New SASA, from foreclosing on the subject property. Those courts properly relied on the explicit language of Section 212(j) of FIRREA, which states that "no court may take any action * * * to restrain or affect the exercise of powers or functions of the Corporation [RTC] as a conservator or a receiver." 12 U.S.C. 1821(j) (Supp. I 1989). As those courts recognized, the RTC plainly has the power and function, as conservator for New SASA, to "collect all obligations and money due the institution." 12 U.S.C.

1821(d)(2)(B) (Supp. I 1989). The RTC's exercise of the right of nonjudicial foreclosure set forth in the deed of trust between SASA and petitioner falls squarely within that power. Thus, Section 212(j) of FIRREA prevents petitioner from bringing a collateral judicial action to enjoin the foreclosure proceeding. See Pet. App. 8-9.

The court of appeals' ruling is consistent with this Court's decision in *Coit Independence Joint Venture* v. *FSLIC*, *supra*, which discussed the meaning of Section 212(j)'s predecessor, 12 U.S.C. 1464(d)(6)(C).[1] The Court explained that Section 1464(d)(6)(C) prohibits "collateral attacks attempting to restrain the receiver from carrying out its basic functions." 489 U.S. at 575. The same purpose is evident in Section 212(j). The RTC's attempts, as conservator, to "collect all obligations and money due the institution," 12 U.S.C. 1821(d)(2)(B) (Supp. I 1989), through nonjudicial foreclosure or otherwise, is plainly one of the conservator's "basic functions." Section 212(j) renders that function exempt from "collateral attacks." See *Rosa* v. *RTC*, 938 F.2d 383, 399 (3d Cir. 1991), cert. denied, No. 91-298 (Dec. 2, 1991).

Petitioner argues that the RTC, as conservator for an institution, should have no broader immunity from collateral judicial attacks than the institution or its officers would have in the absence of the conservatorship. Pet. 15-16. But that is not what Congress has provided. Congress has given the RTC, as conservator, "all of the powers of the members or shareholders,

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[1] Section 1464(d)(6)(C) stated in relevant part:

> Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

the directors, and the officers" of the institution placed under its control. 12 U.S.C. 1821(d)(2)(B)(i) (Supp. I 1989). It has also given the RTC specific conservatorship powers, including the power, described above, to "collect all obligations and money due the institution." 12 U.S.C. 1821(d)(2)(B)(ii) (Supp. I 1989).[2] Congress has then *additionally* provided, in Section 212(j), that no court may "restrain or affect the exercise of powers or functions of the Corporation as conservator or receiver." 12 U.S.C. 1821(j) (Supp. I 1989). Thus, Congress has plainly given the RTC an immunity from collateral judicial attack that the institution or its officers lack, and petitioner's extended discussion concerning the propriety of a preliminary injunction if the institution were not in conservatorship (Pet. 18-25) is simply beside the point.[3]

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[2] The FTC, as conservator, is also empowered to "preserve and conserve the assets and property of such institution," 12 U.S.C. 1821(d)(2)(B)(iv) (Supp. I 1989), and may take such action as may be—

> (i) necessary to put the insured depository institution in a sound and solvent condition; and
>
> (ii) appropriate to carry on the business of the institution ~~and~~ preserve and conserve the assets and property of the institution.

12 U.S.C. 1821(d)(2)(D) (Supp. I 1989). With respect to its powers to dispose of assets, the FTC as conservator may "transfer any asset or liability of the [failed] institution." 12 U.S.C. 1821(d)(2)(G)(i)(II) (Supp. I 1989). In addition to the specific powers granted under the statute, the RTC may also "exercise * * * such incidental powers as shall be necessary to carry out such powers." 12 U.S.C. 1821(d)(2)(I)(i) (Supp. I 1989).

[3] The court of appeals correctly rejected petitioner's cursory constitutional objections (Pet. 24-25) as "meritless." Pet. App. 10. The courts have upheld the constitutionality of Sec-

2. Petitioner also contends (Pet. 8-14) that the court of appeals erred in upholding the dismissal of petitioner's claims on prudential mootness grounds. Petitioner no longer contests, as it did in the court of appeals, the viability of the doctrine of prudential mootness and its applicability where, as here, the FHLBB by resolution has determined that SASA will never have sufficient assets to satisfy its secured and deposit liabilities and therefore no amount will remain for payment of general creditors, such as petitioner. Pet. 8-14. See generally *Gulley* v. *Sunbelt Savings, F.S.B.*, 902 F.2d 348, 351 (5th Cir. 1990), cert. denied, 111 S. Ct. 673 (1991); *Triland Holdings & Co.* v. *Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989). Instead, petitioner now contends that the dismissal was in error because it was *not* seeking monetary relief. Pet. 14.

Petitioner's argument reflects its confusion as to the distinction between the conservatorship for New SASA and the receivership for SASA. To the extent that petitioner sought to have the foreclosure sale enjoined or set aside, its action was against the conservator for New SASA, which held petitioner's defaulted note and was legally entitled to foreclose on the security. The court of appeals properly concluded that Section 212(j) precluded injunctive relief that would restrain or affect the exercise of the powers or functions of the RTC as New SASA's conservator.[4] To the extent that petitioner brought

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tion 212(j)'s almost identical statutory predecessor, 12 U.S.C. 1464(d)(6)(C). See *Haralson* v. *FHLBB*, 837 F.2d 1123, 1125-1127 (D.C. Cir. 1988).

[4] Petitioner's request for an injunction restraining the conservator for New SASA from foreclosing, once barred by

claims for damages arising out of the loan agreement, such claims must be directed to the RTC as receiver for SASA. The receiver for SASA, however, cannot pay such damages because SASA lacked sufficient assets (even prior to the New SASA acquisition agreement) to pay general unsecured claims. Thus, as the court of appeals held, the district court properly dismissed the petitioner's remaining claims. See *Gulley*, 902 F.2d at 351.[5]

Section 212(j), cannot be converted into a "nonmonetary" cause of action (*i.e.*, an order setting aside the foreclosure sale) against SASA's receiver. Pet. 13. SASA's receiver has no power to take action of any sort regarding the foreclosure sale, because the note and property were assets transferred to New SASA pursuant to the acquisition agreement. Petitioner's effort "to have the foreclosure sale set aside" (Pet. 14) is an action that can be directed solely against New SASA's conservator, but is barred under Section 212(j) because it would impermissibly restrain or affect the conservator's statutory power and duty to collect money owed to the institution.

[5] As the court of appeals observed (Pet. App. 6), petitioner cannot look to New SASA's conservator as a source of recovery on its damages claim. As petitioner itself recognizes, "[t]he wrong complained of by 281-300 Joint Venture was that SASA breached the loan agreement by failing to make the payment due to the superior lien holder." Pet. 13. Petitioner's complaint asserted no such claims against the conservator of New SASA, and, even if it had, New SASA would not be liable because it did not assume SASA's potential liabilities to unsecured creditors of SASA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

GERALD L. JACOBS
General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
THOMAS L. HINDES
P. MATTHEW SUTKO
CHRISTOPHER J. BELLOTTO
Attorneys
Resolution Trust Corporation

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